APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 81-0-10

GEORGE P. ROSE, as next friend
of MARLA G. ROSE,

Plaintiff,

vs.

STATE OF NEBRASKA, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed October 9, 1981)

CIVIL NO. 80-0-164

JAMES H. MONAHAN, as next friend
of DANIEL J. MONAHAN,

GEORGE ROSE, as next friend of
MARLA ROSE,

Plaintiffs,

vs.

STATE OF NEBRASKA, et al.,

Defendants.

MEMORANDUM AND ORDER

(Filed October 9, 1981)

ROBINSON, Senior Judge

Marla Rose[1] and Daniel Monahan are handicapped children. Marla is deaf and her speech is impaired. Daniel has muscular dystrophy, he is currently confined to a wheelchair, and is mentally retarded.

In these two actions Marla and Daniel, through their respective next of friends, challenge the validity of certain portions of the Nebraska and federal statutes which relate to the education of handicapped children. See Neb. Rev. Stat. § 43-661-43-668 and 20 U. S. C. § 1401 et seq. Essentially, the plaintiffs are dissatisfied with the educational placement recommended by the defendant school district. This matter is currently before the Court upon the defendants' suggestion of mootness and motion to dismiss. A hearing on defendant's suggestion and motion in both cases was held on August 25, 1981. The suggestion of mootness in each case is considered separately below.

Monahan and Rose v. State of Nebraska et. al., 80-0-164.

In this action the plaintiffs pray for both injunctive relief and damages claiming that § 43-662 Neb. Rev. Stat. is inconsistent with the federal Education for all Handicapped Children Act of 1975. 20 U. S. C. § 1401-1420. Judge Denney granted injunctive relief to Rose but denied same to Monahan on May 16, 1980. [See Memorandum and Order Filings 19 and 20]. The parties appealed and the Eighth Circuit Court of Appeals, in an opinion reported at 645 F. 2d 592 (8th Cir. 1981), affirmed in part, vacated in part, and remanded the case to the District Court. 645 F. 2d at 599.

The federal Handicapped Children Act sets out various procedural requirements which states must follow in order to obtain federal funds for the education of handicapped children. These requirements protect the rights of handicapped children by establishing certain procedural safeguards. Among other things, the Federal Act

requires that the parents of handicapped children be given prior written notice of any change in the educational placement of their children. If the parents are dissatisfied with the placement they are entitled to an impartial due process hearing. The Act provides, that subject to a specified appeals procedure, the decision made at the hearing is final. 20 U. S. C. § 1415.

To comply with the Federal Act, the Nebraska legislature in 1978 amended its statutes dealing with the education of handicapped children by enacting L. B. 871. That legislation includes the provision which is at issue here. Codified at § 43-662 Neb. Rev. Stat. (178), it provides that:

> The 'State' Department of Education shall conduct hearings . . . using hearing officers who shall prepare a report containing findings of facts based on the evidence presented and decisions based on such findings. After reviewing such findings and decisions the Commissioner of Education shall then recommend or direct such action as may be necessary.

The plaintiffs argued, both before Judge Denney and on appeal, that the statute conflicts with the Federal Act which requires that the due process hearing be final. They contend that the statute gives the Commissioner of Education the discretion to reject the hearing officer's findings thereby undermining their right to due process. In granting the preliminary injunction the District Court, Denney, J., found that the Nebraska and Federal Statutes were inconsistent. [Memorandum Opinion at 21. Filing No. 19]. While not finding that the statutes conflict, the Appeals Court concluded that the "possible inconsistency raises questions sufficient to satisfy the preliminary injunction test." 645 F. 2d at 599.

That portion of the Nebraska Statute which is allegedly inconsistent with the Federal Act was deleted by the Nebraska Legislature in July, 1980. L. B. 855 deleted the portion of Neb. Rev. Stat. § 43-662 relating to the Commissioner's review of the due process hearing. *See* Neb. Rev. Stat. § 43-662 (Cum. Supp. 1980). It also specifically provides for the finality of the hearing decision subject only to judicial review. Neb. Rev. Stat. § 43-666 (Cum. Supp. 1980).

In light of the change in the Nebraska legislation, the defendants contend that the primary issue[2] in this action is now moot. They correctly point out that the challenged statute should be considered as it is currently written and not as it once appeared. *See Hall v. Beals*, 396 U. S. 45, 48 (1969); *Golden v. Zwickler*, 394 U. S. 103, 110 (1969).

The plaintiffs maintain that injunctive relief is still appropriate and that the issue is not moot because state law may again change "and the commissioner will again ignore federal law." Essentially, the argument is that the issue is not moot because it is "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498, 515 (1911). This exception to the mootness doctrine first appeared in *Southern Pacific Terminal Co.* and it has been invoked numerous times in the last seventy years. *Dunn v. Blumstein*, 405 U. S. 330 (1975); *Sec. v. Medical Comm. for Human Rights*, 404 U. S. 403 (1972); *Moore v. Ogilvie*, 394 U. S. 814 (1969). The repetition-evasion exception is appropriate, however, only where there is a possibility that the challenged conduct or law will reoccur. When there is no possibility of repetition or where the likelihood of repetition is remote

and speculative the issue is moot. *Defunis v. Odegaard*, 416 U. S. 312, 317 (1974); *Hall v. Beals*, supra at 49.

In this case the possibility that the legislature will again amend the law so that it conflicts with the Federal Act is remote at best. This is particularly true since the Nebraska legislation was passed in an effort to comply with the requirements of the Federal Statute. *Nebraska Legislative Floor Debate on L. B. 871*, 85th Legis. 2d Sess. 08706, 09246 (1978) (statements of Senator Koch). (Cited in Memorandum p. 4, May 16, 1980 Filing No. 19). This is not an appropriate case for the application of the repetition-evasion exception.

The Court finds that the recent amendment of Neb. Rev. Stat. § 43-662 and the enactment of Neb. Rev. Stat. § 43-666 moot the question of whether the Nebraska statute is inconsistent with the Federal Legislation. As amended, the Nebraska statute eliminates any discretion previously vested in the Commissioner and thereby insures the integrity of the due process hearing.

While the recent amendments to the Nebraska statutes extinguish the plaintiff's claim that the Nebraska statute is at odds with the Federal Act, there is still a question of whether the case should proceed to a determination of what damages, if any, the plaintiffs have sustained. In this regard, the defendants claim that the entire controversy is moot. They point to various developments with respect to the status and educational placement of Marla and Daniel which they contend makes further proceedings unnecessary. In determining whether any justiciable issues remain, the Court will consider the background and current status of each child.

MARLA ROSE.

Marla Rose attended class at Beveridge Junior High School in the Omaha School District prior to the 1978-79 school year. The defendant School District notified Marla's parents in June, 1978 that it proposed to change Marla's placement from Beveridge to the Nebraska School for the Deaf. Her placement at the latter was to be on a residential basis. The proposed change in placement was based on the School District's determination that Marla was not making any progress under the oral method of instruction. The School District decided that Marla needed instruction in both the oral method and manual method of instruction. The Nebraska School for the Deaf was chosen because it is the only school equipped to teach both methods to a person of Marla's age.

Dissatisfied with the proposed change, Marla's parents requested a due process hearing on August 14, 1978. The hearing was completed on March 23, 1979 and the hearing officer submitted his report to the Commissioner of Education on May 16, 1979. The hearing officer recommended that the Rose's appeal be dismissed because the proposed placement provided Marla the full appropriate education required by law. *See Springdale School District v. Grace,* slip op. No. 80-1777 p. 7 (8th Cir. August 7, 1981). (Defining "appropriate education" under the Federal Act). The Commissioner adopted the hearing officer's report verbatim and dismissed the Rose appeal.

On June 28, 1979, Marla's father, George Rose, filed a *pro se* complaint in this Court challenging the Commissioner's decision. [CV. 79-0-300]. In compliance with the Federal Act's requirement that a child's educational place-

ment be held in status quo during litigation 20 U. S. C. § 1415(e)(3), the parties to that suit entered into a stipulation providing that Marla would attend Monroe Junior High School where Marla's studies would be practically identical to those at Beveridge. After two weeks, Marla's parents unilaterally removed her from Monroe and placed her in an unaccredited private school with no special programs for deaf children.[3] Mr. Rose's suit was dismissed for failure to join an indispensible party on November 29, 1979. On February 2, 1980 George Rose filed another action, [CV 80-0-67], again challenging the Commissioner's decision. That suit was dismissed in October, 1980 because it was duplicative of the present action.

On May 16, 1980 Judge Denney entered an order in this case providing in part that Marla was to "be returned to her 'then current educational placement' in the Omaha Public Schools" and, absent a contrary agreement between the parties, remain there "during the pendency of all proceedings held under the Act." Order p. 2-3, May 16, 1980 Filing # 20. Marla resumed her studies in the Omaha School District on November 3, 1980. She remained in school until February 6, 1981.

Marla's eighteenth birthday was on February 3, 1981. On May 3, 1981 Marla married Timothy Corrado. Marla and her husband now reside outside the boundaries of the Omaha School District in an area served by the Millard School District.

DANIEL MONAHAN.

Daniel attended Madonna School, a private school for the mentally retarded, through the 1978-79 school year.

The Omaha School District paid for Daniel's education at Madonna. In the Spring of 1979, Daniel became confined to a wheelchair. Since Madonna is not equipped to educate children confined to a wheelchair, Daniel's father, James Monahan, requested that the Millard School District recommend a new educational placement for Daniel. The Millard School District recommended that Daniel be placed in Millard's George Norris Elementary School.

The Omaha School District agreed to permit Daniel to attend George Norris but refused to finance that placement because the Omaha District's Hartman School could provide Daniel with the same educational opportunity. Despite the Omaha School District's refusal to finance the George Norris placement, Daniel began attending class at George Norris in August, 1979. The cost was borne by Daniel's father.

Mr. Monahan never requested a due process hearing on the Omaha School District's refusal to finance Daniel's education. Instead, this suit was filed. The Eighth Circuit Court of Appeals held that, in light of the apparent conflict between the Nebraska statute and the Federal Act, Mr. Monahan was not required to exhaust his administrative remedies.

> We also concur with the district court's conclusion that, in the circumstances, Daniel Monahan was not required to exhaust his administrative remedies under the Nebraska Act. . . . In the present case, Monahan's claim that the state procedure on its face conflicts with the Federal Act could not be addressed effectively by the state administrative process. 645 F. 2d at 597.

As of this writing, Mr. Monahan continues to finance Daniel's education in the Millard School District.

The recent amendments to the Nebraska statutes eliminate the need for injunctive relief by extinguishing plaintiffs' primary complaint. In addition to seeking an injunction, the plaintiffs also assail the hearing procedure itself and seek damages.

The plaintiff Rose raises a litany of objections to the administrative hearing on Marla's educational placement and urges the Court to review that placement. While the Federal Act does provide for judicial review of the placement decision 20 U. S. C. § 1415(e)(2), the Court declines to undertake such a review in this case. Marla Rose has not attended class in the Omaha School District since February 6, 1981. Her failure to remain in school is in direct contravention of Judge Denney's Order requiring that Marla remain in her "current educational placement" throughout these proceedings.[4] In addition to her absence from school, Marla, by virtue of her marriage, is emancipated Neb. Rev. Stat. § 38-101 and currently resides outside the boundaries of the Omaha School District. Because of Marla's change in residence and her emancipation, the Omaha School District no longer has responsibility for Marla's education. Marla's educational placement must now be determined by the Millard School District—the district in which she currently resides. *State ex rel. Rittenhouse v. Neuman*, 189 Neb. 657, 204 N. W. 2d 372 (1973); *Russell v. State*, 62 Neb. 512, 87 N. W. 344 (1901). In short, a review by the Court of Marla's prior placement would be superfluous.

While Marla has indicated that she desires to continue her education and that she plans to move back into the Omaha School District [See Filing # 49 CV 81-0-10 and Filing # 40 CV 80-0-164], the fact remains that she has not

attended school for nearly eight months and continues to reside outside the district. To ignore Marla's emancipation and change in residence and consider the merits of her prior placement would require the Court to render what would amount to an advisory opinion. Such an opinion would do more than decide the abstract proposition of what placement would be proper if Marla did reside in the Omaha School District. The Court will not engage in such an undertaking on the chance that Marla might return to her former school district. *See Cass County v. United States,* 570 F. 2d 737 (8th Cir. 1978).

Even if there had been no change in Marla's status, the Court would be reluctant to consider the alleged infirmities in the placement hearing. The Appeals Court observed that "the placement hearing was free from procedural error save for the alleged impermissible review by the Commissioner." 649 F. 2d 599. The essence of this dispute is a disagreement between Marla's parents and the Omaha School District regarding Marla's proper educational placement. Such a disagreement does not itself lead to the conclusion that there was some defect in the hearing procedure. Marla's parents have already had the benefit of a due process hearing. The only colorable defect in the hearing procedure was the Commissioner's review. That review amounted to nothing more than the Commissioner adopting the hearing officer's decision verbatim. Any violation of due process resulting from the Commissioner's review was, like Narcissus' reflection, illusionary.

The plaintiff Rose also raises a claim for damages. If damages are ever recoverable under the Federal Act—an issue the Eighth Circuit expressly did not decide[5]—there is no basis for making any award here. Rose cer-

tainly sustained no damage from the Commissioner's unequivocal endorsement of the hearing officer's decision. Nor can Marla's parents recover the tuition for sending her to a private school. The decision to withdraw Marla from the Omaha School District was made solely by Marla's parents. Faced with a similar situation, the Fourth Circuit observed in *Stemple v. Board of Education*, 623 F. 2d 893, 897 (4th Cir. 1980) that:

> [The Federal Act] creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending. . . . Of course, that duty may not be totally enforceable by the state, but it certainly negates any right on the part of parents, in violation of the duty and in the absence of agreement, to elect arbitrarily to place their child in a private school and recover the tuition costs thus incurred.

The Eighth Circuit Court of Appeals cited *Stemple* with approval, finding that Marla's parents were "not presently entitled to compensation for the cost of sending her to a private school." 645 F. 2d at 598. Under the circumstances, no damages are recoverable.

Marla is now emancipated and living outside the Omaha School District. As a result, further proceedings on her proper placement in that district would be pointless. The primary issue raised by this action has been mooted by the admendments to the Nebraska Statutes. Accordingly, the Court finds that as to the plaintiff Rose this action is moot and should be dismissed.

The plaintiff Monhan did not exhaust his administrative remedies. Rather, he brought this action seeking a judicial determination of Daniel's proper educational place-

ment. Monahan was not required to exhaust the available state remedies *solely* because of the alleged inconsistency between the state and federal statutes. 645 F. 2d at 597. That inconsistency has now been rectified and there is no longer any justification for permitting Monahan to circumvent the state procedure. The state's hearing officer is in the best position to make an initial determination on Daniel's proper placement. And, there is no reason to believe that the state cannot or will not proceed in an expeditious manner if Mr. Monahan opts for a due process hearing.

The whole tenor of the Federal Act indicates that judicial review is appropriate only after the state has made a final placement decision. The Second Circuit Court of Appeals in *Riley v. Ambach*, Slip Op. No. 80-7600 (2nd Cir. May 19, 1981) reversed a district court's decision to enjoin various regulations promulgated by state school officials relating to the classification and placement of handicapped children. Finding that the plaintiffs should have been required to exhaust their administrative remedies, the Court observed that:

> A strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a Federal Court with local factors that legitimately affect administration. [Citations omitted]. If the expert agency cannot resolve the problem finally, the record made in the administrative proceedings will be extremely helpful to the court, since the administrative agency will likely have probed the issue with more expertise than a federal court could bring to bear, and therefore, have illuminated the issue for final decision in the federal court.

Slip Op. at pp. 5-6. This consideration is particularly important in the present case. A determination on the merits of the Monahan complaint would undoubtedly require a comparison and evaluation of the programs available at the Hartman and George Norris schools. This Court has no particular expertise in determining which school can best meet the needs of Daniel Monahan. That issue is best resolved, at least initially, by the state. The Court concludes that the plaintiff Monahan must exhaust his administrative remedies before seeking further judicial relief. See, *Ezratty v. Commonwealth of Puerto Rico,* 648 F. 2d 770 (1st Cir. 1981).

Parenthetically, it should be noted that Monahan is not entitled to any damage award. That issue was, for all practical purposes, disposed of by the Eighth Circuit. "[T]he decision to place Daniel in the Millard School District was made by his parents unilaterally; they must bear the resulting tuition expense." 645 F. 2d at 598.

Rose v. State of Nebraska, et al. CV 81-0-010,

This case presents essentially the same issues considered in CV 81-0-164. Their resolution in the previous discussion is applicable here. The plaintiff Rose does raise one additional issue. Namely, Mr. Rose alleges that the hearing officer erred in his disposition of case No. 80-06. That action was filed by Mr. Rose before the Nebraska Department of Education. It again challenged the educational placement of Marla Rose. The hearing officer dismissed Rose's petition because Judge Denney's Order in CV 80-0-164, requiring that Marla remain in her current educational placement, was in effect. See *Rose v. School District of Omaha,* Decision and Order p. 13 Case No. 80-06 (Dept. of Ed. Dec. 8, 1980).

Given the status of Marla's placement at the time, the hearing officer's decision was proper. More important for purposes of this action is Marla's change in status. Since Marla is now married and residing outside the Omaha School District, the hearing officer's decision is moot.

In short, the Court finds that the questions presented in CV 80-0-10 are duplicative of those raised in CV 80-0-164 and are mooted by Marla's decision to marry and move outside the Omaha School District.

THEREFORE,

IT IS ORDERED that defendants' motion to dismiss CV 80-0-164 and CV 80-0-010 is sustained. CV 80-0-164 and CV 80-0-010 are accordingly dismissed without prejudice.

Dated this 9th day of October, 1981.

BY THE COURT:

/s/ Richard E. Robinson
Senior Judge, United States District Court

FOOTNOTES

1. Marla Rose was married to Timothy Corrado on May 3, 1981. For clarity, she is referred to here by her maiden name.

2. Both the District Court and the Court of Appeals characterized the question of whether the Nebraska legislation conflicts with the Federal Act as the primary issue in the case.

   See Memorandum p. 3, May 16, 1980 Filing # 19; *Monahan v. Nebraska,* 645 F. 2d 592, 595 (8th Cir. 1981).

3. The parties agree that neither Monroe nor the private school provided Marla with an appropriate education. Memorandum p. 6, May 16, 1980 Filing # 19.

4. The parties never agreed to any change in Marla's placement. Under the terms of Judge Denney's Order of May 16, 1980 such an agreement was required to alter Marla's educational placement.

5. In a footnote the Court said "we do not reach the . . . question whether money damages are ever available under the Federal Act." 654 F. 2d at 598 n. 9. (Citations omitted).

   The Seventh Circuit, however, recently considered the damage issue in *Anderson v. Thompson,* Slip Op. No. 80-2364 7th Cir. Sept. 8, 1981. The Court affirmed the district court's denial of a damage award. "We hold that Congress, though including within the [Federal Act] a private right of action which authorizes district courts to award appropriate relief, did not intend to provide an award of money damages in the absence of exceptional circumstances."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2106

James H. Monahan, as next friend of Daniel J. Monahan,
George Rose, as next friend of Marla Rose,

Appellants,

vs.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District No. 1, Douglas County, Nebraska, Owen Knutzen, Individually, and as Superintendent of School District No. 1, Douglas County, Nebraska, Dale Samuelsen, Individually, and as Assistant Superintendent in Charge of Special Education, of School District No. 1, Douglas County, Nebraska, Anne Campbell, Commissioner of Education for the State of Nebraska, State Board of Education, Walter M. Thompson, Individually, and as a Member of the State Board of Education, Margaret Lockwood, Individually, and as a Member of the State Board of Education, Frank E. Landis, Individually, and as a Member of the State Board of Education, Don M. Lienemann, Individually, and as a Member of the State Board of Education, Dorothy Creigh, Individually, and as a Member of the State Board of Education, Arlene E. Hart, Individually, and as a Member of the State Board of Education, William C. Ramsey, Individually, and as a Member of the State Board of Education, Dorothy Beaver, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, June Bostwick, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Walter Calinger, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Pat Geringer, In-

dividually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Leo Hoffman, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Gaynelle Goodrich, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Ruth Thomas, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Frank Bogard, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, McGruder, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, James A. Monaghan, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, James Beutel, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska, Leo Kastrick, Individually, and as a Member of the Board of Education, School District No. 1, Douglas County, Nebraska,

Appellees.

On Appeal from the United States District Court
for the District of Nebraska

No. 81-2196

George P. Rose, as next friend of Marla Rose,
Appellant,

vs.

State of Nebraska, Charles Thone, Governor of The State of Nebraska, Board of Education, School District No. 1, Douglas County, Nebraska, Owen Knutzen as Superintendent of School District No. 1, State Board of Education for the State of Nebraska, Anne Campbell, Individually, and as Executive Officer for the State Board of Education, State Department of Education for the State of Nebraska,

Anne Campbell, Administrative Head of the State Department of Education, Anne Campbell, Commissioner of Education for the State of Nebraska, Patricia Harris, Secretary of HEW, Edward W. Martin, Office of Special Education, U. S. Department of Education, U. S. Department of Health, Education, and the U. S. Department of Education,

Appellees.

Submitted: May 19, 1982

Filed: August 30, 1982

Before McMILLIAN, Circuit Judge, MARKEY,* Chief Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

James Monahan and George Rose brought these actions on behalf of their handicapped children, Daniel Monahan and Marla Rose, now Marla Corrado.[1] The complaints pleaded claims arising under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U. S. C. § 1401 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, and 42 U. S. C. § 1983. The principal issue in this case, at least at its inception, has been the validity of the Nebraska statutory procedure for administrative

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*The Hon. Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1]For a full statement of the facts, the reader is referred to the District Court's opinion on preliminary relief, *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), and to this Court's opinion on appeal therefrom, 645 F. 2d 592 (8th Cir. 1981), as well as to the District Court's opinion on remand, *Rose v. Nebraska*, 530 F. Supp. 295 (D. Neb. 1981), from which the instant appeal is taken.

appeals from placement decisions made by school officials. Plaintiffs claimed that Nebraska law as it existed when their complaints were first filed, Neb. Rev. Stat. § 43-662 (1978), gave the State Commissioner of Education the power to review conclusions reached by hearing officers on administrative appeals filed by dissatisfied parents. This power of review, it was argued, is in conflict with EAHCA itself, under which a decision made by an impartial hearing officer is final. After remand from this Court's decision on the prior appeal having to do with preliminary relief, the District Court[2] dismissed the complaints as moot because the allegedly offending provision of state law had been amended to make it clear that the Commissioner of Education could not change a decision made by a hearing officer. L. B. 855, effective July 19, 1980, now codified as Neb. Rev. Stat. § 43-662 (Cum. Supp. 1980), made this change. The District Court discussed other issues raised by the complaints and ultimately decided to dismiss them without prejudice.

Plaintiffs appeal, claiming among other things, that repeal of the challenged statute does not make the case moot. For the most part, we affirm, but we do remand for consideration of an award of attorney's fees to the plaintiff Rose.

I.

The question whether plaintiffs' original attack on the alleged inconsistency between Nebraska law and EAHCA is now moot need not detain us long. The inconsistency

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[2]The Hon. Richard E. Robinson, Senior United States District Judge for the District of Nebraska.

has disappeared, and there is no measurable possibility that it will ever recur. To pursue the issue now would be to render an advisory opinion, which we may not do under Article III of the Constitution. For the reasons ably set forth by the District Court, the question of conflict between the state and federal laws is no longer a live controversy. See *Rose v. Nebraska*, 530 F. Supp. 295, 298-99 (D. Neb. 1981). Plaintiffs make certain other complaints about the Nebraska procedure implementing EAHCA, but these questions were resolved against them by this Court on the prior appeal. "The record establishes that the placement hearing was free from procedural error, save for the alleged impermissible review by the Commissioner." *Monahan v. Nebraska*, 645 F. 2d 592, 599 (8th Cir. 1981). So far as prospective injunctive relief against the operation of the Nebraska statutory scheme is concerned, this case is moot.

II.

Even though the plaintiffs' attacks on the Nebraska procedural scheme for reviewing EAHCA complaints are moot, however, plaintiffs might still be entitled to review of the substantive decision made in the placement of their children, and they so contend on this appeal. We agree with the District Court that these issues are also moot. Marla Rose became 18 years of age on February 3, 1981, and on May 3, 1981, she married Timothy Corrado. Under Neb. Rev. Stat. § 38-101 (1978), Marla's minority ended with her marriage, and her residence therefore no longer automatically follows that of her parents. She and her husband have moved out of the Omaha School District, which was the principal defendant below, and, since Feb-

ruary 6, 1981, Marla has voluntarily ceased attending classes. She now lives in another school district and does not attend school. While she has stated that she plans to move back to the Omaha School District and continue her education, we are not told when this will occur. Whether it will ever actually happen is speculative, and therefore the issues she raises about her proper educational placement are not yet ripe for adjudication. Given these circumstances, it would be improper for us to address her requests for declaratory and injunctive relief. See *DeFunis v. Odegaard*, 416 U. S. 312 (1974).

The plaintiff Monahan contends that the question of his son, Daniel's, proper placement is not moot. Mr. Monahan wants this Court to direct the Omaha School District to contract with the Millard School District, School District No. 17, so that Daniel can attend the Developmental Center at the George Norris School, within the Millard School District, at the expense of the Omaha School District. As to this claim, we again agree with the District Court that relief is barred, not because of mootness, but because of failure to exhaust administrative remedies. Monahan never invoked the impartial hearing process provided by state law. On the prior appeal, we excused his failure to exhaust because of his contention, which undoubtedly had substance, that the procedures provided by Nebraska statutes were in conflict with federal law. It would make no sense to require someone to exhaust an administrative remedy when his very contention is that the remedy provided is unlawful. As we stated on the prior appeal 645 F. 2d at 597: "Although the federal framework mandates initial resort to the state administrative process, 20 U. S. C. § 1415 (e) (2), exhaustion is not re-

quired where it would be futile or where the administrative remedy would be inadequate. . . . In the present case, Monahan's claim that the state procedure on its face conflicts with the Federal Act could not be addressed effectively by the state administrative process."

The claimed defect in state law has now, as we have explained above, been cured, and Monahan can no longer successfully contend that state administrative remedies fail to comply with EAHCA. He must therefore exhaust those remedies before he can ask a federal court to direct for his child a different placement from that thought best by the school authorities. We note that Monahan, himself a member of the State Board of Education, must have known as early as July, 1980, that state law was being changed to comply with EAHCA. In addition, the record contains a letter addressed to Mr. Monahan, dated August 27, 1980, specifically advising him that state law had been changed and instructing him in detail how to avail himself of the administrative process provided by the state. Monahan made no move to seek administrative review of the placement decision which he now asks us to correct. In these circumstances we may not proceed with his claim, to the extent that he seeks prospective injunctive relief affecting his son's educational placement in the future.

III.

Plaintiffs also press their claim for damages, which, to the extent that it is based on an allegedly substantively improper educational placement, as opposed to claimed procedural defects in the Nebraska statutes, would not be mooted by the change in state law. The District Court,

citing *Stemple v. Board of Education*, 623 F. 2d 893, 897 (4th Cir. 1980), held that damages are not recoverable for the costs of tuition at a school voluntarily selected by parents. We cited *Stemple* approvingly in our first opinion in this case, 645 F. 2d at 598, and we have now held, in any event, that there is no private right of action for damages under EAHCA, except perhaps in exceptional circumstances not present here. *Miener v. Missouri*, 673 F. 2d 969, 979-80 (8th Cir. 1982).

Plaintiffs correctly point out, however, that their complaints also relied on § 504 of the Rehabilitation Act, 29 U. S. C. § 794, and we have now held, *Miener v. Missouri*, *supra*, 673 F. 2d at 977-79, that there is a private right of action for damages under § 504, and that "§ 504 suits appropriately may be maintained in advance of the exhaustion of administrative remedies." *Id.* at 978 (footnote omitted). *Miener* was handed down several months after the District Court's opinion now being reviewed, and so necessarily raises issues that court did not consider.

We therefore turn to the allegations of plaintiffs' complaints[3] to determine what they are claiming with respect to the Rehabilitation Act, as opposed to EAHCA. We are left with many questions. Obviously the pleaders'

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[3]We use the plural—"complaints"—because while the first appeal was pending Rose filed a new civil action in the District Court, No. 81-0-10 (now No. 81-2196 in this Court), primarily for the purpose of challenging a hearing officer's dismissal of an administrative appeal filed while the District Court's order that Marla be kept in the interim placement specified by the school district was still in effect. We agree with the District Court that No. 81-0-10 was duplicative of No. 80-0-164 (now No. 81-2106 in this Court), the case originally brought by Monahan and Rose together.

main reliance was on EAHCA. Paragraph 2 of the original complaint, D. R. 2, alleges that "[t]his action is brought pursuant to the provisions of P. L. 94-142, The Education for All Handicapped Children Act." The gravamen of the complaint is that Nebraska has failed to provide for an impartial, "due process" hearing at which parents may contest educational placements, in violation of EAHCA. This procedural question is now moot, for reasons we have already described, and plaintiffs' other procedural complaints about the Nebraska statutory process are completely without merit. There are references in the complaints to § 504 of the Rehabilitation Act, but they are obscure, to say the least. We have read and reread these pleadings, and the claims of violation of § 504 seem to rest on the same procedural theories that plaintiffs have unsuccessfully urged under EAHCA. References to 42 U. S. C. § 1983 are even more cryptic and seem to have been included as another means of making the same procedural arguments. We are not persuaded, on the record before us, that it was error to dismiss these complaints without prejudice.

Our affirmance of a dismissal without prejudice technically leaves the way open to a re-filing of these cases on a new complaint. We have no wish to breed litigation that will do no one any good, so we add a few words for the guidance of the District Court and the parties if the matter is pursued. The Rehabilitation Act and EAHCA are entirely different statutes. EAHCA imposes an affirmative duty on recipients of federal funds to provide a free, appropriate education for handicapped children. The Supreme Court has recently explained the extent of this duty. *Board of Education v. Rowley*, 50 U. S. L.

Week 4925 (U. S. June 28, 1982). EAHCA is primarily a procedural statute, as the Supreme Court now seems to have construed it. It does impose a substantive duty, but only to afford an adequate education, not necessarily the kind of education necessary to maximize each handicapped child's personal development. Most questions of educational theory and methodology are left to the state's educational authorities. The Rehabilitation Act, on the other hand, is both broader and narrower than EAHCA. It is broader in the sense that it applies to a wide range of federally funded activities, not just to education. It is narrower in that it is not, generally speaking, an affirmative-action statute. "[N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *Southeastern Community College v. Davis,* 442 U. S. 397, 411 (1979) (footnote omitted). Section 504, instead, is simply a prohibition of certain conduct on the part of recipients of federal financial assistance.

The Section reads, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

The language of the statute is instructive. It prohibits exclusion, denial of benefits, and discrimination "solely by reason of . . . handicap." Manifestly, in order to show a violation of the Rehabilitation Act, something more than

a mere failure to provide the "free appropriate education" required by EAHCA must be shown. The reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under EAHCA, is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap. An evaluation, in other words, is not discriminatory merely because a court would have evaluated the child differently.

We do not read § 504 as creating general tort liability for educational malpractice, especially since the Supreme Court, in interpreting the EAHCA itself, has warned against a court's substitution of its own judgment for educational decisions made by state officials. We think, rather, that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children. It is our duty to harmonize the Rehabilitation Act and the EAHCA to the fullest extent possible, and to give each of these statutes the full play intended by Congress. The standard of liability we suggest here accomplishes this result and also reflects what we believe to be a proper balance between the rights of handicapped children, the responsibilities of state educational officials, and the com-

petence of courts to make judgments in technical fields. So long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under § 504.

The application of this standard to the complaints in this case as they now stand can yield only one result. After the claims of EAHCA violations and procedural inconsistencies between the Nebraska statute and EAHCA are laid to one side, nothing of substance in the way of allegations of fact remains, certainly nothing that could be said to amount to a charge of "discrimination" against either Marla Rose or Daniel Monahan. We therefore conclude, though for reasons somewhat different from those given by the District Court, that it was not error to dismiss the complaints without prejudice. What the Supreme Court has recently said in another context has some application here. "For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg v. Romeo*, 50 U. S. L. Week 4681, 4685 (U. S. June 18, 1982) (footnotes omitted) (§ 1983 action against medical professionals).

IV.

It remains to consider plaintiffs' claim that this case is not moot because they are still entitled to an award of attorneys' fees, even if all of their substantive claims

have now been properly disposed of. The question of attorneys' fees was not explicitly addressed by the District Court, but that Court's order dismissing the complaints must be taken to have implicitly rejected any suggestion that fees should now be awarded. We are partly in agreement. As to the plaintiff Monahan, we see no reason for award of attorney's fees or costs. The preliminary injunctive relief that he initially requested was denied by the District Court, and this denial was affirmed on his appeal to the Court of Appeals. *Monahan v. Nebraska, supra,* 645 F. 2d at 598. It is clear, therefore, that Monahan has not prevailed on any claim, and he is therefore not entitled to attorney's fees, either under the Rehabilitation Act or 42 U. S. C. § 1988.

We think the situation is otherwise as to the plaintiff Rose. The District Court initially granted Rose's motion for a preliminary injunction. Defendants point out that this Court, on the first appeal, vacated that portion of the District Court's order requiring a second hearing on Marla Rose's placement. We are urged, therefore, to conclude that Rose, like Monahan, was not a prevailing party on the first appeal. We disagree. Although the precise form of relief granted by the District Court was vacated by this Court, we did not reject outright Rose's request for preliminary relief. We held only that "due to the passage of time and changed circumstances the form of relief granted should be modified." *Monahan v. Nebraska, supra,* 645 F. 2d at 599. The case was remanded for the District Court to determine what relief might be appropriate. In addition, in the course of our opinion on the first appeal we agreed with the District Court that "the resulting harm to Marla Rose was irreparable and that

preliminary relief was appropriate to limit such harm." *Id.* at 598. We think Rose was a prevailing party in these circumstances. It is true that only preliminary relief was involved, but this is not a case where Rose prevailed at the preliminary injunction stage, only to lose later on the merits. The dismissal of Rose's complaint after the remand was principally on the ground of mootness, not on the ground that the Nebraska statutory scheme, as it originally existed when this action was first instituted, was in fact in compliance with federal law.

The initial proceedings in the District Court and on the first appeal to this Court were, it is true, based primarily on the EAHCA, and that statute contains no provision for attorneys' fees. Rose's complaint, however, also claimed, among other things, that the injection of the Nebraska Commissioner of Education into the hearing process prevented that process from being impartial, in violation of the Due Process Clause of the Fourteenth Amendment. A claim of that kind, of course, can be the basis for an action under 42 U. S. C. § 1983, and parties who prevail in actions to enforce § 1983 are, in the usual case, entitled to an award of attorneys' fees under 42 U. S. C. § 1988. It does not matter that the constitutional, or § 1983, ground was not actually reached, and that the complainant prevailed, to the extent that he did at all, on his EAHCA ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the Court to reach the § 1983 claim, an award of fees is nevertheless appropriate. See *Robert M. v. Benton*, 671 F. 2d 1104 (8th Cir. 1982), a case with some similarities to the present ones.

Accordingly, although we affirm the District Court's dismissal of these complaints in most respects, a remand is appropriate for the limited purpose of determining the proper amount of attorney's fees and costs to be awarded to the plaintiff Rose, the fees and costs involved to be limited to those incurred up through the decision by this Court on the first appeal. Ordinarily this Court determines the proper amount of attorneys' fees to be awarded for services rendered before it, but since the appeal with respect to which the plaintiff Rose substantially prevailed was before another panel of this Court, we think the most expeditious way of handling the matter in the present situation is for the District Court, on remand, to determine the proper amount of fees and costs to be awarded both for the services rendered before it at the preliminary-injunction stage of the case, and for services rendered before this Court on the first appeal.

V.

The judgment of the District Court, dismissing the complaints without prejudice, is affirmed, except to the extent that it rejects the claim of the plaintiff Rose for an award of attorney's fees and costs. In this limited respect, the judgment of the District Court is vacated, and the cause remanded to that Court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

Nos. 81-2106/2196

George Rose, etc., et al.,

Appellants,

vs.

State of Nebraska, et al.,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 1, 1982

APPENDIX D

Rose, Maria G.	138581	09	02	03	63	333	6337	041	881	Nathan Hale Jr. High

MATHEMATICS and Mathematics	CAIN Midwestern Baptist Academy	20901	2	1	1			1.00	
GEOGRAPHY AND Social Studies	NIMPS Midwestern Baptist Academy	41304	2	1	1			1.00	
ENGLISH I (2nd Quarter only)	SEGELL	01101	2	0	1			.50	
ISCS SCIENCE (2nd Quarter only)	BUCKLEY	31105	2	0	1			.50	
ART (2nd Quarter only)	JENSEN	71101	2	0	1			.50	

			3.50	3.50

TO THE PARENTS OF:

Maria G. Rose
3321 South 122nd St.
Omaha, NE 68144

NUMBER OF LEAVES

OF

CUMULATIVE DAYS ABSENT

1ST QTR	2ND QTR	3RD QTR	4TH QTR	TOTAL
—	2.0			

CUMULATIVE DAYS TARDY

1ST QTR	2ND QTR	3RD QTR	4TH QTR	TOTAL
—	2.0			